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No. 06-1345

In The

Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

Petitioners,

v.

MOUNT LAUREL TOWNSHIP,

Respondent.

On Petition For a Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
I. EMINENT DOMAIN MUST BE BASED ON SOUND PLANNING; OTHERWISE IT HAS NO LEGITIMATE BASIS	4
II. MOUNT LAUREL ENGAGED IN NO PLANNING BEFORE INITIATING EMINENT DOMAIN; THE PROCESS WAS A SHAM BUT THE NEW JERSEY SUPREME COURT UPHELD IT	8
III. WHEN EMINENT DOMAIN IS SHOWN TO BE BASED ONLY ON PRETEXT, AND NOT ON ANY REAL PLANNING PROCESS, THE JUDICIARY MUST – AS THIS COURT PLAINLY CONCLUDED IN *KELO* – STEP IN AND PROTECT THE PRIVATE PROPERTY OWNERS FROM SHAM PROCEEDINGS	11
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) 16

Agins v. City of Tiburon, 447 U.S. 255 (1980) 2

Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995) 2

Berman v. Parker, 348 U.S. 26 (1954) 5

Board of County Comm'rs v. Lowery, 136 P.3d 639 (Okla. 2006) 13

Borden Ranch P'Ship v. U.S. Army Corps of Engineers, 537 U.S. 99 (2002) 2

C.I.R. v. Duberstein, 363 U.S. 278 (1960) 11

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) 2

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 2, 13, 14

City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006) 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) 11

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 2, 14, 15

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) 5

Kelo v. City of New London, 545 U.S. 469 (2005) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)..... 12

Lingle v. Chevron USA, Ltd., 544 U.S. 528 (2005)..... 2

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).....2, 15, 16

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)..... 2

Marbury v. Madison, 1 Cr. 137 (1803)..... 12

Mayor & City Council of Baltimore v. Valsamaki, 916 A.2d 324 (Md. 2007) 13

National Assn. of Home Builders v. Defenders of Wildlife, No. 06-340..... 2

Nectow v. Cambridge, 277 U.S. 183 (1928) 11

Nollan v. California Coastal Commn., 483 U.S. 825 (1987)..... 2

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)..... 2, 5

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).....13, 15

Rhode Island Economic Dev. Corp. v. The Parking Company, L.P., 892 A.2d 87 (R.I. 2006)..... 12

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 2

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981)..... 2

San Remo Hotel v. San Francisco, 545 U.S. 323 (2005)..... 2

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)..... 2

TABLE OF AUTHORITIES – Continued

Page

Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) 9

Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725 (1997) 2, 5

Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency, 535 U.S. 302 (2002) 2, 5, 15

Williamson County Reg. Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 2

Winger v. Aires, 89 A.2d 521 (Pa. 1952) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend V 1, 13, 14

OTHER AUTHORITIES

Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse In the Post-Kelo World* (2006) 8

Brian W. Blaesser, *Eminent Domain for Private Gain? The* Kelo v. City of New London *Decision and Aftermath*, 57 Planning & Environmental Law 3 (APA Sept. 2005) 6

Mark Pellegrini & Donald Poland *Connecticut Planners Weigh In: Eminent Domain Is Important Land Use Tool*, 57 Planning & Environmental Law 8 (APA, Sept. 2005) 6

Timothy Williams, "Land Bought For Parks Often Winds Up Luring Trash and Old Cars," New York Times, Aug. 12, 2006, p. C16. 9

With the written consent of the parties filed with the Clerk of the Court, the National Association of Home Builders (NAHB) respectfully submits this brief as *amicus curiae*.[1]

INTEREST OF *AMICUS CURIAE*

NAHB represents more than 235,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes, as well as apartment, condominium, commercial, and industrial structures, land developers, and remodelers. It is the voice of the American shelter industry. It is — and historically has been — vitally concerned with judicial decisions dealing with government taking and regulation of property, with a particular interest in this Court's interpretation and application of the 5th Amendment.

NAHB and its members regularly grapple with the complexities of competing demands for the use of land and the impact of comprehensive planning and eminent domain. NAHB is vitally concerned with the proper use of both and the prevention of their abuse.

NAHB has appeared before the Court as an *amicus curiae* or "of counsel" to property owners (and, most recently, in its own name) in a wide variety of 5th Amendment and real property cases. This participation

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity other than *amicus*, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

began more than a quarter-century ago with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and continued with *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), *Kelo v. City of New London*, 545 U.S. 469 (2005), *Lingle v. Chevron USA, Ltd.*, 544 U.S. 528 (2005), *San Remo Hotel v. San Francisco*, 545 U.S. 323 (2005), and *National Assn. of Home Builders v. Defenders of Wildlife*, No. 06-340 (pending decision).

NAHB thus offers its experience in this field and its national perspective in support of the Petitioners.

SUMMARY OF ARGUMENT

This Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) provided only half an answer to the question of what are the boundaries of the concept of public use in eminent domain. It demonstrated the breadth of interests encompassed within that term. But both the majority opinion (545 U.S. at 487) and Justice Kennedy's concurring opinion (545 U.S. at 493) made clear that the Court understood the potential for governmental abuse and assured that the judiciary would be capable of dealing with abuse of the power of eminent domain when it arose.

If the Court had been actively searching for a case to provide the other half of the answer — to provide the bookend that shows where government may *not* go — this would be the ideal case. This is a case in which the condemning agency plainly went too far. It acted without the careful planning this Court saw in *Kelo* and, as New Jersey's appellate courts conceded, condemned MiPro's property without a plan at all. To date, however, the judiciary is not fulfilling this Court's promise in *Kelo* to guard against such abuse. The New Jersey Supreme Court upheld a taking that has only the flimsiest pretense of a public use. If that is legally acceptable, then there is no restriction at all and no 5th Amendment protection for property owners.

It is important for the Court to take this opportunity while *Kelo* is still an event of recent memory to demonstrate that there *is* a public use restriction on the power of eminent domain, and to

reassure the public that possession of power is no excuse for misusing it.

I

EMINENT DOMAIN MUST BE BASED ON SOUND PLANNING; OTHERWISE IT HAS NO LEGITIMATE BASIS.

When it decided *Kelo*, this Court made clear that its decision was based on what it viewed as comprehensive, well studied planning by the municipality. It was only in the context of such planning that the Court upheld the city's action:

> "The City has *carefully formulated* an *economic development plan* that it believes will provide appreciable benefits to the community . . . . As with other exercises with urban planning and development, the city is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. . . . Given *the comprehensive character of the plan, the thorough deliberation that preceded its adoption*, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges . . . *in light of the entire plan*." (*Kelo*, 545 U.S. at 483-484; emphasis added.)

That, indeed, had been the position urged on the Court by the American Planning Association (APA), the

organized voice of the nation's land use planning professionals. That association urged the Court to uphold New London's actions because of the protections afforded to individuals by a comprehensive planning process. As the APA brief put it, "eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain." (*Kelo*, Amicus Curiae Brief of APA, et al., p. 25.)

The primary cases forming the basis for *Kelo* also firmly rooted their holdings in comprehensive planning, either for urban renewal in a large, run-down area of Washington, D.C. (*Berman v. Parker*, 348 U.S. 26 [1954]) or to rectify the semi-feudal land tenure arrangements prevailing in Hawaii (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 [1984]).

In recent years, the Court has embraced the view (consistently urged by APA and unchallenged by other litigants) that good land use planning is a good idea that should be encouraged. (See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 339 [2002] ["interest in facilitating informed decisionmaking by regulatory agencies"]; *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 [2001]; *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 736 [1997].)

But it is more than that. In the eminent domain context, good comprehensive planning provides property owners with the protection of knowing that their land

will not be taken on a municipal whim,[2] that any resolution authorizing the forced conversion of private property into public property will be preceded by careful study, public hearings, and a fair opportunity for all community voices to be heard – including the voices of the affected property owners.[3] That is the consensus view of those commentators who have defended *Kelo*[4] in the teeth of sharp criticism and concern expressed by people who fear, as Justice O'Connor put it, that local government can now "replac[e] any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." (*Kelo*, 545 U.S. at 503 [O'Connor, J., dissenting].)

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[2] "Nor would the City be allowed to take property under the mere pretext of a public purpose . . . ." (*Kelo*, 545 U.S. at 478.)

[3] "The takings before us . . . would be executed pursuant to a 'carefully considered' development plan" (*Kelo*, 545 U.S. at 478) in which "[t]he city complied with elaborate procedural requirements." (*Id.* at 493 [Kennedy, J. concurring].)

[4] See, e.g., Mark Pellegrini & Donald Poland, *Connecticut Planners Weigh In: Eminent Domain Is Important Land Use Tool*, 57 Planning & Environmental Law 8, 9 (APA, Sept. 2005) (use of eminent domain "should only occur after there is a rigorous, open, and fair public planning process"); Brian W. Blaesser, *Eminent Domain for Private Gain? The* Kelo v. City of New London *Decision and Aftermath*, 57 Planning & Environmental Law 3,5 (APA, Sept. 2005) (emphasizing that "the record below evidenced the comprehensive character of the economic development plan").

Plainly, this Court recognized that abuses of the eminent domain power could occur, but viewed them as "aberrations" with which the courts could deal – indeed, noting that courts in the past had scrutinized such abuses with "a skeptical eye." (*Kelo*, 545 U.S. at 487, n. 17.) Such problems, said the Court, "can be confronted if and when they arise." (*Id.* at 487.) Or, as Justice Kennedy put it, although *Kelo* was not in the suspect group, "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible" that the courts ought to deal with them. (*Id.* at 493 [concurring opinion].)

The problem is that *Kelo* provided lower courts with no guidance as to the location of the nether end of the public use spectrum, i.e., the point at which broad deference to local decisions ends and the "skeptical eye" comes into play. This case is the proverbial poster child for the out of bounds marker. This Township engaged in no planning. This Township had no specific use in mind when it condemned the MiPro property. In stark conflict with its own planning and zoning regulations, this Township acted solely to stop a residential development that had been properly approved through the Township's own process. And it did so while giving a wink and a nod to the judiciary, noting that it possessed the power to condemn for "open space" even though it had no plans or studies identifying this property as necessary or even useful as open park land while its avowed intent was merely to stop MiPro's approved residential development.

The trial court saw through the pretext, "confronted" it as this Court advised in *Kelo*, and struck it down. And yet two layers of New Jersey appellate courts thereafter held that this abject failure of planning was sufficient to fit within the *Kelo* matrix, validating the worst nightmares of those who saw *Kelo* as allowing cities to do virtually anything they choose.

This Court needs to take a stand. Now. Firmly. It needs to show the lower courts that it did not intend *Kelo* to loose a deluge of condemnations that have no basis in fact.[5]

II

MOUNT LAUREL ENGAGED IN NO PLANNING BEFORE INITIATING EMINENT DOMAIN; THE PROCESS WAS A SHAM BUT THE NEW JERSEY SUPREME COURT UPHELD IT.

What happened in Mount Laurel was not planning; it was its antithesis. Indeed, it is the paradigmatic illustration of the absence of planning. To the extent that this Township engaged in planning, the planning supported MiPro's residential development, not condemnation for some nondescript "open space." The property was planned and zoned for residential

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[5] The outpouring of eminent domain actions immediately after *Kelo* by agencies that felt unleashed by that decision is catalogued in Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse In the Post-Kelo World* (2006).

development; the Township's Planning Board twice gave the project its approval, which was neither appealed nor litigated; there were no studies showing any different need.[6] All that happened — after MiPro's construction was under way — was that the Township made an *ad hoc* decision that it wanted to keep this development out of town, so it hastily condemned.[7] That was a Pavlovian reaction, not a well designed municipal plan.

Even the New Jersey appellate courts that approved this condemnation had to concede that there was no plan — but then (contrary to *Kelo*) asserted that the absence of a plan didn't matter. (Pet. App., pp. 16a,

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[6] The fact that a parcel of land is currently vacant does not mean that it is either needed or appropriate for some municipally owned "open space." It only means that the land is currently not being used. Municipal takeovers do not always yield positive results. See Timothy Williams, "Land Bought For Parks Often Winds Up Luring Trash and Old Cars," New York Times, Aug. 12, 2006, p. C16.

[7] This was not the first time that Mount Laurel chose to put itself in the land use spotlight for exclusionary activities. In *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), the New Jersey Supreme Court forcefully told the Township that it was seeking to foist too much of the regional housing need onto its neighbors and needed to shoulder its fair share. It obviously hasn't learned and is trying another exclusionary ploy in the guise of condemning residential development land for open space in a way that stretches *Kelo* beyond recognition. This time, instead of merely saying it didn't want low and moderate income families, it said it didn't want *any* families.

23a.) Nor did the evident fact that the "public use" of preserving open space was no more than a pretext for stopping this specific residential development — even though MiPro's development was wholly consistent with the local planning and zoning and had been approved by the local Planning Board and not challenged.[8] NAHP understands that private property may be condemned for open space. The point here is that open space condemnation — like condemnation for any other use — must be preceded by careful municipal study of the kind discussed in *Kelo* in order to support it. Such a study was concededly absent here, rendering this particular open space condemnation invalid, and its approval by the New Jersey Supreme Court in conflict with the underlying basis of *Kelo* and the holdings by other courts discussed in the Petition and hereafter.

The actions of New Jersey's Appellate Division and Supreme Court demonstrate that they got only half of *Kelo*'s message. They got the part about "deference," but missed the part about the need for honest municipal planning providing the basis for the taking, and the part about restraint on condemnations whose basis is wholly pretextual. In the process, those courts seem to have overlooked their role in the litigation process. This case went to trial, and the trial court made extensive and

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[8] More than that, by waiting until after MiPro had begun construction, the Township caught MiPro at its most vulnerable moment. Adding insult, the New Jersey Supreme Court noted that MiPro should be compensated only for the face value of the land (Pet. App., p. 2a) even though that would fall short even of providing restitution, as the dissent aptly showed (Pet. App., pp. 5a-7a).

explicit findings of fact. Those findings plainly showed the sham nature of the Township's actions. The appellate courts did not set aside any of those findings, they simply ignored them. This Court has repeatedly warned against such actions, noting the important role played by triers of fact. (E.g., *C.I.R. v. Duberstein*, 363 U.S. 278, 289-291 [1960]; *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1964]; *Nectow v. Cambridge*, 277 U.S. 183 [1928].)

Without this Court's prompt intervention, the danger is real that the approach of the influential New Jersey Supreme Court will be adopted by others and remove the 5th Amendment's intended protection. This Court should act now to explain the lower limit of *Kelo* before more people are injured by decisions like this one. The country needs reassurance that, even under *Kelo*'s highly deferential standard of review, the core of the "public use" limitation remains in place and provides protection at *some* point.

III

WHEN EMINENT DOMAIN IS SHOWN TO BE BASED ONLY ON PRETEXT, AND NOT ON ANY REAL PLANNING PROCESS, THE JUDICIARY MUST – AS THIS COURT PLAINLY CONCLUDED IN *KELO* – STEP IN AND PROTECT THE PRIVATE PROPERTY OWNERS FROM SHAM PROCEEDINGS.

Reviewing the constitutionality of legislative acts is neither to be sought nor taken lightly. However, such

review is a necessary part of our constitutional system. As this Court explained, such review is undertaken:

> ". . . with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution." (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 [1963].)[9]

Whether legislative action complies with the Constitution is a question for the judiciary — and has been since *Marbury v. Madison*, 1 Cr. 137 (1803). Thus, even though *Kelo* insisted on deferring to municipal planning judgment, it based that conclusion on the premise that municipal judgment would be based on competent, comprehensive planning, and declared that judicial deference would not go so far as to rubber stamp obviously sham and pretextual actions. (*Kelo*, 545 U.S. at 487; see also *Id.* at 493 [Kennedy, J., concurring].)

In direct conflict with *MiPro*, this proper reading of *Kelo* was made by the Supreme Courts of Rhode Island (*Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.*, 892 A.2d 87, 104 [R.I. 2006] ["*Kelo* . . . stressed the condemning authority's responsibility of good faith and due diligence before it may start its condemnation engine"], Ohio (*City of Norwood v. Horney*, 853 N.E.2d 1115, 1137 [Ohio 2006] ["deferential review is not satisfied by superficial scrutiny"; "our precedent does not demand rote deference to legislative findings in eminent domain"]

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[9] Plainly, municipalities are entitled to no more deference than Congress.

and Oklahoma (*Board of County Comm'rs v. Lowery*, 136 P.3d 639 [Okla. 2006] [relying on state constitution], and the Maryland Court of Appeals (*Mayor & City Council of Baltimore v. Valsamaki*, 916 A.2d 324, 348 [Md. 2007] ["it is not enough . . . to simply say that it is conducting urban renewal and leave it at that"]).

The necessary restraint placed on total deference to municipal action arises directly from the Constitution, and specifically from the Bill of Rights, which was designed to restrict the power of government. This is, after all, the 5th Amendment to the U.S. Constitution that is being applied, and the bedrock protection declared in *Kelo* cannot be undermined by state courts acting like New Jersey's appellate courts.

As Justice Holmes explained for the Court early in the 20th century, "[t]he greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922].)[10]

That philosophy of judicial restraint was stressed again more recently in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), when the Court concluded:

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[10] See also *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) (enjoining improper use of eminent domain): "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review."

> "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny *under all circumstances*, its position is contrary to settled regulatory takings principles. We reject this claim of error." (*Del Monte*, 526 U.S. at 707; emphasis added.)

Del Monte was a continuation of the Court's modern regulatory taking decisions and a precursor of *Kelo*. Its rejection of deference to municipal action "under all circumstances," the standard the government had sought, forms an appropriate jurisprudential bridge.

In *First English*, the Court ended years of indecision by concluding that compensation is the proper remedy for a regulatory taking. Despite that holding's clear 5th Amendment grounding, the defendant county and its many *amici* had argued that the constitutional mandate be subordinated to their fiscal and operational concerns. The Court rejected that hyperbolic plea, concluding that:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities*, and

> the Just Compensation Clause of the Fifth Amendment is one of them." (*First English*, 482 U.S. at 321; emphasis added.)

First English and the cases leading up to it saw this Court granting substantial deference to the governing activities of municipalities noting expressly, for example, that "normal" delay in the planning process would not lead to governmental liability. (*First English*, 482 U.S. at 321; see also *Tahoe-Sierra*, 535 U.S. at 333.) But *First English* expressed the need for a constitutional limit at some point even if that restricted government's freedom and flexibility.

Kelo began the trip down that same road for direct condemnation.[11] It held that government was entitled to substantial leeway in order to perform its legitimate functions and, as long as it acted in a conscientious planning mode, all would be well. But there are limits. *Kelo*'s majority obviously believed that government deviance would be limited to the occasional exception, and assumed that the judiciary would handle such situations as it had in the past. (*Kelo*, 545 U.S. at 487.) However, as this case illustrates, lower courts need more explicit guidance. They need this Court to show by example how far (to borrow the words of Justice Holmes) is "too far" (*Pennsylvania Coal*, 260 U.S. at 415) in the direct condemnation context.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) is instructive. Viewing a statute that

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[11] Direct and inverse condemnation are based on the same substantive law. (See *First English*, 482 U.S. at 315.)

contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, n. 10), this Court stressed that what is important is *not* the voiced legislative rationale, but whether the underlying facts actually support the legislative result. Remanding the case to give the State an opportunity to defend its legislative handiwork, this Court "emphasized[d] that to win its case, South Carolina must do more than proffer the legislature's declaration . . . or its conclusory assertion . . . ." (*Lucas*, 505 U.S. at 1031.) *A fortiori*, if the legislature's actual (albeit conclusory) formulation of a supposed justification is insufficient to validate legislation challenged under the Takings Clause — unless supported by facts produced at trial — then pretextual condemnation for open space that is not even a thinly disguised cloak for an effort to abort a legitimate and approved home building project cannot suffice either.

CONCLUSION

In *Kelo*, this Court collected some illustrations of the kind of abuses that can occur in the eminent domain process, largely abuses brought about when local entities yielded to influence from those with inside connections or the ability to apply sufficient pressure. (E.g., *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 [C.D. Cal. 2001] [condemnation influenced by Costco, described by the city as its "800 pound gorilla"].) Although the Court viewed such events as "aberrations" (*Kelo*, 545 U.S. at 487, n. 17), the awful example at bench is here less than two years later. What this case shows is that, unless checked by this Court, municipalities will be emboldened by

decisions like the New Jersey Supreme Court's and the "aberrations" will multiply. This example cannot be allowed to remain on the books as an approved condemnation under the *Kelo* standard.

NAHB urges that Certiorari be granted.

Respectfully submitted,

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